

No. 76-957

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

D. L. WITHINGTON, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioner brought this action in the United States District Court for the Northern District of Oklahoma to challenge certain actions of the Federal Energy Administration pursuant to the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, as amended, 15 U.S.C. (Supp. V) 751 *et seq.* On June 10, 1976, the district court entered summary judgment in favor of respondents (Pet. App. A). On June 21, 1976, petitioner filed notice of appeal to the Court of Appeals for the Tenth Circuit. On August 25, 1976, the Tenth Circuit dismissed the appeal for lack of jurisdiction (Pet. App. B).

The decision of the Tenth Circuit is correct since appeal in cases of this type lies exclusively in the Temporary Emergency Court of Appeals. The Emergency Petroleum Allocation Act, 15 U.S.C. (Supp. V) 754(a)(1) expressly incorporates Section 211(b)(2) of the Economic Stabilization

Act of 1970, as added, 85 Stat. 749, reprinted in the note to 12 U.S.C. (Supp. V) 1904, which provides that the Temporary Emergency Court of Appeals "shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title * * *." Consequently, the Temporary Emergency Court of Appeals and not the Court of Appeals for the Tenth Circuit had jurisdiction over petitioner's appeal. *M. Spiegel & Sons Oil Corp. v. B.P. Oil Corp.*, 531 F. 2d 669 (C.A. 2). See *Bray v. United States*, 423 U.S. 73; *United States v. Cooper*, 482 F. 2d 1393 (T.E.C.A.). Accordingly, the petition for a writ of certiorari should be denied.¹

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

¹The record indicates that during the hearing on respondents' motion to dismiss, the district court suggested that petitioner could appeal to the Tenth Circuit (Tr. 82), and that after the Tenth Circuit dismissed petitioner's appeal for lack of jurisdiction the clerk of the Temporary Emergency Court of Appeals refused to accept petitioner's notice of appeal in that court as untimely (Pet. App. C). If petitioner believes that those facts constitute unique circumstances warranting waiver of the time requirements of the rules of the Temporary Emergency Court of Appeals (see *Fallen v. United States*, 378 U.S. 139; *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215), his proper recourse is to file a motion in the Temporary Emergency Court of Appeals requesting that his untimely appeal be accepted for filing. See *Reed v. Kroger Co.*, 478 F. 2d 1268 (T.E.C.A.).

It should be noted, however, that notwithstanding the district court's suggestion, petitioner had ample notice that appeal could be taken only in the Temporary Emergency Court of Appeals. In addition to the notice provided by the statute, respondents' motion to dismiss the appeal, which pointed out the Tenth Circuit's lack of jurisdiction, was served on July 2, 1976, ten days before the expiration of the time to appeal to the Temporary Emergency Court of Appeals. Despite that notice, petitioner failed to perfect his appeal to the latter court.